(4)

No. 06-580

In The

Supreme Court of the United States

OCTOBER TERM 2006

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BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

FRANK G. and DIANNE G. Parents of a Disabled Student, ANTHONY G.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

This brief is submitted, pursuant to Rule 15, in reply to those new points raised by Respondents in their Brief in Opposition to the Petition for Certiorari.

ARGUMENT

POINT I

THE UNITED STATES DEPARTMENT OF EDUCATION'S INTERPRETATION FO THE STATUTE AT ISSUE IS NOT ENTITLED TO CHEVRON DEFERENCE.

Respondents refer this Court to authority never relied upon by the Second Circuit itself in reaching its conclusion regarding the disputed statutory language – i.e., the United States Department of Education's preambles to the final rules issued in implementation of the IDEA Amendments in 1999 and 2006. Brief in Opposition to Certiorari, pp. 18-20.

As Respondents concede, however, no court has relied upon (or apparently even discussed) the USDOE's language contained in those preambles, even though a number of federal district courts and circuit courts have now weighed in on the issue. Id., p. 17.

(i) ***Chevron Deference Would be Inappropriate, since the Statute is Clear on Its Face.***

We respectfully submit that Chevron deference is, in any event, not warranted in this circumstance. It is settled law that, "...if the intent of Congress is clear," a court reviewing an agency's construction of a statute that its administers,

"...must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Where, as here, no ambiguity exists in the statute's language, deference to the USDOE's interpretation would be inappropriate.

(ii) ***If, as Respondents Appear to Concede, the Statute is Ambiguous, Such Ambiguity Defeats Any Claim That Congress Unambiguously Conditioned Receipt of Federal Monies in the Manner Asserted.***

In the Petition for Certiorari, we have argued that the Second Circuit's decision below is inconsistent with this Court's recent ruling in Arlington v. Murphy, ___ U.S. ___, S. Ct. 2455 (2006). Specifically, this Court has held that statutory disputes under IDEA must be viewed under a Spending Clause analysis, under which the proponent of a particular statutory interpretation must be able to demonstrate that Congress has unambiguously conditioned the receipt of federal monies in the manner asserted. Petition for Certiorari, at pp. 17-18.

In suggesting that the USDOE's interpretation of the statute should be given deference, Respondents impliedly adopt what the Second Circuit conceded – that the statutory

provision at issue is ambiguous. See, Second Circuit's Opinion at pp. 46a and 52a of the Petition for Certiorari.

However, such statutory ambiguity will defeat a claim that Congress has clearly and unambiguously conditioned the States' receipt of federal monies in the manner asserted by the USDOE:

> ...When Congress attaches conditions to a state's acceptance of federal funds, the conditions must be set out unambiguously.

Arlington Central School District v. Murphy, 126 S. Ct. 2455, 2459 (2006); see also, Gregory v. Ashcroft, 501 U.S. 452, 464, and Pennhurst State School and Hospital v. Haldeman, 451 U.S. 1, 17 (1981).

As it is apparent that Congress has not spoken with nearly the degree of specificity required to condition States' receipt of IDEA funds in the manner suggested, the Chevron deference argument should be rejected, and certiorari should issue, as the Second Circuit's decision is in conflict with prior decisions of the Court.

POINT II

RESPONDENTS' ARGUMENT THAT THE DECISION AT ISSUE IS CONSISTENT WITH ARLINGTON V. MURPHY IGNORES THE SPENDING CLAUSE ANALYSIS.

Respondents argue that this Court's decision in Arlington v. Murphy is "irrelevant"[1] since:

> ...(P)etitioner has pointed to nothing in the 1997 amendments or their legislative history that demonstrates that Congress intended to overturn Burlington's long settled construction of courts' broad discretionary powers under the Act.

Brief in Opp., p. 22.

This argument, of course, turns the Spending Clause analysis on its head – the burden should have been upon respondents to show, in clear and unmistakable terms, that Congress intended the 1997 amendments to IDEA be construed to allow tuition reimbursement to parents who never enrolled their children in special education services provided by a public school system.

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[1] The Second Circuit's decision, issued after Arlington, nowhere cites to its decision, nor to the Spending Clause itself, in that Court's lengthy analysis of the statutory terms at issue.

POINT III

RESPONDENTS' PROPOSED READING OF THE STATUTE, IF FOLLOWED, WOULD ONLY POINT OUT THE AMBIGUITY OF THE LANGUAGE AT ISSUE.

In the Petition, it was pointed out that statute clearly limits tuition reimbursement to a situation where a student has, "...previously received special education and related services under the authority of a public agency" [Pet., p. "2"], but that the Second Circuit found that "previously," in this context, referred to the status of the law prior to the 1997 Amendments. Id., at pp. 10-11.

Respondents' Brief, however, makes no attempt to explain or justify this unsupportable conclusion by the Second Circuit – instead, it proffers its own explanation of the statutory language, which is entirely different than that provided by the Second Circuit:

> ...(A) better reading, we submit, would be to read §1412(a)(10)(c)(i) as providing a safe harbor protecting school authorities from reimbursement awards only if they make a FAPE available to the child, and to read clauses (ii) and (iii) as clarifying the circumstances in which parents of a child "who previously receives special education and related services under the authority of a

> public agency" may obtain tuition reimbursement under Clause (ii), as the Department of Education does not address whether reimbursement is available to parents whose children never received such services. This reading does not treat the contested phrase as superfluous (see, Pet. 18), but rather recognizes that the phrase describes the subset of children to which the requirements of (iii) pertain.

Id., p. 19, fin. "2."

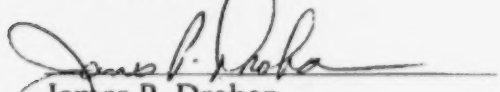
As can be seen by this footnote, Respondents' interpretation of the statute is completely different from that espoused by the Second Circuit. When viewed against the Second Circuit's own ruling, Respondents' reading simply demonstrates ambiguity in the statute at issue, and such ambiguity means the USDOE's interpretation of the statute would not pass muster under the Spending Clause analysis set forth in Point II, supra.

CONCLUSION

IT IS RESPECTFULLY REQUESTED THAT THE PETITION FOR CERTIORARI BE GRANTED.

Dated: Hopewell Junction, NY
January 2, 2007

Respectfully submitted,
DONOGHUE, THOMAS, AUSLANDER & DROHAN, LLP

By: 

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